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EXAMINER

WEINSTEIN, STEVEN L

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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/783,540
Filing Date: February 20, 2004
Appellant(s): PIENKOS, JOHN T.

John Pienkos
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 10/30/08 appealing from the Office action mailed 4/28/08.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

4,120,385

KIENLE (Germany)

12-1992

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6,423,357	WOODS ET AL	7-2002
3,384,495	POTTER ET AL	5-1968
2004/0018276	HSIEH	1-2004
D405,936	KOJIMA	2-1999
D195,498	GORDON	6-1963
D193,542	GORDON	9-1962
D193,541	GORDON	9-1962
D194,780	GORDON	3-1963
D309,210	SEYFERT	7-1990
D67,885	GANSLE	7-1925
D212,070	HRESCHAK	8-1968
2002/0132029	TERAS ET AL	9-2002
2006//0040020	MARIC	2-2006
2004/0011223	ODOM	1-2004
1,718,997	BURT	7-1929
3,331,626	KAUFMAN	7-1967

Appellant's Admission of the Prior Art

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-3, 5-11, 13-16 and 21-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kienle (DE'385) in view of Woods et al (6,423,357), Potter (3,384,495), Hsieh (2004/0018276), Kojima (D405,936), the Gordon patents, (D195,498), (D194,780), (D193,542), and (D193,541), Seyfert (D309,210), Gansle (D67,885), Hreschak (D212,070), Teras (2002/0132029), Maric (2006/0040020), Odom (2004/0011223), Burt (1,718,997) and Kaufman (3,331,626), further in view of applicant's admission of the prior art.

In regard to claim 1, Kienle discloses a food product comprising a pocket formed from dough (#1), a portion of a food stuffing material (#2) captured within the pocket and a protrusion (#3) coupled to the pocket, wherein the protrusion is capable of being grasped and, when so grasped, the pocket is capable of being supported by the protrusion. As an example, the abstract recites that the pastry has a meat filling, the bread covering has an end at least at one side which is unfilled and projects over the end of the inner filling, and the composite material can be sold without requiring an eating plate, and without separate handling for the bread and filling at the point of sale. Thus, Kienle teaches both appellant's problem and appellant's solution. That is, Kienle teaches if one desires to hand hold a composite food material (i.e., a food material comprising two or more components or phases), one should provide the food product with an extension or projection of the outer component covering to form a handle. Claim 1 also recites relative length, width and depth dimensions, and an extent of the protrusion relative to the pocket. Once it was known in the art to provide a food product with a protrusion for handling purposes, including one that is a composite food product,

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comprising a dough enclosed, food stuffing material, the particular dimensions of the food product, including the protrusion, used for handling, is seen to have been an obvious result effective variable and/or an obvious matter of choice and/or design. In regard to the dimensions of the pocket food itself, Appellant's admission of the prior art (e.g., page 1, para.2 and 3, and page 3, para.8, of the specification) discloses that he is employing conventional dough based, pocketed products, such as pierogies, ravioli and calzones. Appellant admits that these composite/"pocket" foods are conventional and that he takes these conventional pocket foods and adds one or more flanges/ears or other protrusions to them. Therefore, the relative dimensional relationships of the pocket food itself are conventional and thus read on the recited dimensions. In fact, a product such as a calzone has dimensions more like Kienle's product, which further evidences the dimensional relationships are conventional and thus obvious. Note, too, that Kienle is not being employed in the rejection as a reference that anticipates the claim and its dimensions, but rather as part of a combination of references, including appellant's admission of the prior art which evidences the fact that the dimensions would have been obvious. In regard to the protrusion being grasped, the protrusion of Lienle can be grasped and used for handling and does not require an eating plate. Since Lienle discloses hand-holding the food product by the protrusion, the particular area for grasping would have been an obvious routine determination. Woods et al (e.g., fig. 3,#50 and col. 4,para.1), Potter et al (e.g., fig.1,#2), Hsieh (e.g., fig. 1), Kojima (e.g., fig. 1 and the title), Gordon ('498, e.g., fig.1), Gordon ('780, e.g., fig.1), Gordon ('542, e.g., fig.1), Gordon ('541, fig.1), Seyfert ('210, e.g., fig.1), Gansle (e.g., fig.2), Hreschak (e.g.,

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fig.4), Teras et al (e.g., page 1, para. 9), Maric (e.g., fig. 5), Odom (e.g., fig.1), Burt (e.g., fig.6) and Kaufman (e.g., fig.4) are all relied on as further evidence that it was notoriously conventional to provide edibles with either integral or attachable, edible handles in the form of all types of projecting members. As for the extent and size of the projection, since Kienle, and the art taken as a whole, discloses edible, inedible and even edible/inedible composite handles, associated with food products to allow one to manipulate the food product, the particular dimension and extent of the handle, vis-a-vis the rest of the product, would have either been an obvious result effective variable, routinely and obviously determinable, or an obvious matter of choice and/or design.

In regard to claim 2, since Kienle discloses that the projection is to be used for handling the composite product, the projection would inherently be sufficiently large to be grasped by at least the recited fingers. In regard to claim 3, Kienle teaches that the protrusion has little, if any, food stuffing material therein. In regard to claim 5, the protrusion of Kienle is integrally formed. In regard to claim 6, which recites two layers, although it is not clear if the protrusion of Kienle is two layers or not, whether the protrusion is two layers or not is a function of how it is made, and not seen to have patentable significance in the final product. The art taken as a whole teaches the conventionality of protrusions made from two layers as evidenced, e.g., by Hreschak (e.g., fig.4). Also, appellant's admission of the prior art (page 1, para.3) discloses it was conventional to make composite foods wherein two or even four layers are involved. To modify Kienle and employ two or more layers would therefore have been an obvious matter of choice and/or design. In regard to claim 7, Kienle discloses cooking the

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protrusion (e.g., abstract, “baked together”). In regard to claim 8, Kienle discloses that the dough based covering has an end “at least” at one side, which is unfilled and projects beyond the filling. Thus, Kienle discloses there can be more than one protrusion. In regard to claim 11, the art taken as a whole (e.g., the reinforced handle of Woods et al, col.4,para.1 and Odom fig.1) discloses edible or inedible, or edible/inedible combinations, as projections for use as handles, and to therefore modify Kienle for its art recognized and applicant’s intended function and provide a support beam, whether edible or inedible, would therefore have been obvious, as is the particular conventional food product employed as the support element. In regard to claim 13, the particular conventional composite food product employed is seen to have been an obvious matter of choice. Claims 14, 15, and 21-26 are rejected for the reasons given above. For example, as noted above, applicant’s admission of the prior art discloses that it was conventional to employ plural layers, including four layers, in a composite food product. Finally, claim 9 recites that the protrusion is capable of being grasped by a clip and claims 10 and 16 appear to positively recite the clip. In regard to claim 9, the protrusion of Kienle would appear to be capable of being grasped by some-sized clip. In any case, as evidenced by Kaufman, it was conventional in the art to employ a flexible, plastic holder (i.e., a clip), which is capable of grasping a food product to be held, and is also capable of being grasped by the thumb and index finger, so that the hand does not directly touch the food and get soiled. To modify the combination and provide a structure, which would allow one to hold the protrusion without directly touching the protrusion, would therefore have been obvious.

(10) Response to Argument

All of appellant's remarks have been fully and carefully considered but are not found to be convincing, essentially for the reasons of record and the remarks above. The remarks are directed to differences in shape or dimensions which, as noted above, would have been obvious in view of the art taken as a whole. It is not convincing to argue that Kienle does not disclose the particular dimensional relationship or the particular orientation of the protrusion/handle. Kienle is combined with a number of references as part of an obvious rejection under 35USC103. Patentability is predicated on what the art taken as a whole teaches at the time of appellant's invention. If Kienle had taught all of the recitations, then the rejection would have been in view of Kienle alone, under 35USC102, anticipation. Also, since Kienle discloses the generic concept of providing a composite product with an extension to be used as a handle, it would have been obvious to apply this teaching to any other conventional composite product. Also, since the intended function of the projection in the prior art is to use it as a handle for grasping, it would have been obvious to increase the size or the extent of the projection to make grasping easier. Appellant urges that none of the references specifically disclose the recitation that the protrusion is coupled to the pocket along at least most of a 90 degree segment around a perimeter that extends around the pocket and substantially encompasses the length and width dimension. In response, it is noted that the art taken as a whole does not have to specifically disclose the exact recited

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extent of the protrusion, vis-a-vis the pocket for the rejection to be proper. As noted above, in view of the preponderance of the evidence, taken as a whole, the art taken as a whole would fairly suggest to one of ordinary skill in the art that once it was known to provide a composite product with a protruding handle, the extent of the handle would have been an obvious determination/optimization, routinely determinable. Appellant's apparently sole disclosed reason for the recited extent of the protrusion relative to the pocket, is found on page 11, lines 9-12 of the specification wherein it is noted that the extended portion (i.e., relative to the other disclosed embodiments wherein the protrusion does not extend as far) provides a grasping surface that offers considerable support for the composite food. This is not an unexpected result. It is an expected result. One of ordinary skill in the art would expect that the greater the surface contact or surface area or connection there is between the protrusion and the main body, the greater the degree of support there would be. This is also a basic structural/mechanical concept and common sense. Finally in this regard, note that although Gordon ('498) does not disclose a composite product, Gordon ('498) nevertheless discloses a protrusion that extends along at least most of a 90 degree segment around a perimeter that extends around the rest of the food product.

On page 11 of the Brief, it is urged that stuffed dough pockets such as pierogi or ravioli are "typically" (note the use of the word) not hard, rigid structures. This urging is directed to limitations not found in the claims. The claims are silent as to the degree of rigidity of the recited products. This would not be an issue in any case, because any projection would allow one to handle the product to some degree, whether the product

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(and/or handle) is rigid or flexible. Note, too, that the word used in claim 1 is that the pocket is capable of being “supported” by the protrusion, which is readable on the pocket being in any orientation (even vertical) when the pocket is held, i.e., supported by the protrusion. On page 15 of the Brief, and referencing claim 13, it is urged by appellant that it is not seen that the selection of the particular composite food product would have been an obvious matter of choice. As noted previously, once it was known to provide a composite food product with a protrusion for handling, the particular conventional composite product one selected to increase its handling ability, is seen to have been an obvious matter of choice. It is noted that as with the other claims, there is no recitation of the degree of rigidity or flexibility. Note, too, that the claim recites the pocket is “generally of the form of a pierogi”, which is open to a product shaped like a pierogi. Also, although the art taken as a whole discloses multiple layers for composite materials, it is further noted that, it is, of course, a basic physical principle that increasing the thickness of a material increases its strength, so that there would be no unexpected result in employing multiple layers.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner’s answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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